RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 10-803

In the
Supreme Court of the United States

DEL BANJO,

Petitioner,

v.

VINCE CULLEN, ACTING WARDEN,
SAN QUENTIN PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The State's brief in opposition confirms that certiorari is warranted. The State exhibits an even greater degree of confusion than did the Ninth Circuit over the difference between conditions to filing and conditions to obtaining relief – the core principle governing AEDPA's entire tolling regime. The State's arguments addressing the three questions presented fail to engage the reasons set forth in the petition for why review is needed here. And, having failed in that endeavor, the State is left to advocate an alternative ground for affirmance that is utterly without merit. The petition should be granted.

ARGUMENT

A. The State Fails To Offer A Substantive Response To Any Of The Questions Presented.

1. The first question presented asks the Court to resolve a circuit split over the proper treatment of a State's "due diligence" requirement under AEDPA's tolling provision. In the decision below, the Ninth Circuit improperly treated the due diligence requirement of California's successiveness bar as a "condition to filing" rather than a "condition to obtaining relief," in direct conflict with this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), and the Fifth Circuit's decision in *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999). *See* Pet. 16-23.

The State's principal response reveals the confusion that continues to exist over the distinction this Court drew in *Artuz*. The State contends that no conflict over what constitutes a "condition to filing" versus a

"condition to obtaining relief" is presented here because those terms relate to the meaning of the statutory phrase "properly filed," and the Ninth Circuit never held that Banjo's second petition was not "properly filed." Opp. 21. The State asserts: "Because the Ninth Circuit's decision did not find any petition was not 'properly filed,' its decision does not even implicate *Artuz*, let alone create a circuit split." *Id.* at 22.

The premise of the State's response is incorrect. The Ninth Circuit *did* hold that Banjo's second petition was not "properly filed," and that he was not entitled to tolling for any of the time related to that petition as a result. Specifically, the court of appeals concluded that Banjo's second petition was "not timely" (Pet. App. 11a), and an untimely petition is, by definition, not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2). *See Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) ("In *Artuz v. Bennett*, *supra*, we held that time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed.'").

The Ninth Circuit predicated its ruling entirely on the state trial court's finding that Banjo had not exercised due diligence in discovering the new evidence that formed the basis for his second petition. That finding did not relate to timeliness; as the Ninth Circuit noted, the state court did *not* find Banjo's second petition to be untimely. Pet. App. 8a. The lack-of-diligence finding instead related (at most) to the applicability of California's successiveness bar, which, as relevant here, precludes granting relief on previously asserted claims that are supported by new facts, unless the new facts could not in the exercise of due diligence have been discovered in time to present

them in an earlier petition. *In re Clark*, 855 P.2d 729, 748 (Cal. 1993); *In re Martin*, 744 P.2d 374, 390 n.3 (Cal. 1987).[1]

By equating the state court's lack-of-diligence finding with untimeliness, the Ninth Circuit treated the due diligence requirement of California's successiveness bar as a "condition to filing," when *Artuz* and *Villegas* make clear that it is instead a "condition to obtaining relief." *See Artuz*, 531 U.S. at 10-11; *Villegas*, 184 F.3d at 471-72 & n.3. Indeed, the successiveness bar at issue in *Villegas*, which required a petitioner to show that the factual basis for the claims "was not ascertainable through the exercise of reasonable diligence" at the time an earlier petition was filed (*id.* at 468), is identical to the procedural bar the state court found to apply here, and which the Ninth Circuit in turn invoked to preclude tolling. The effect of the Ninth Circuit's error on this critical point was to preclude Banjo from entering federal court altogether, depriving him of any opportunity to demonstrate that he in fact complied with California's due diligence requirement (thereby rendering the successiveness bar inapplicable), and that, in any event, the successiveness bar is not an adequate and independent state ground which could preclude federal review of Banjo's claims.

The State attempts to defend the Ninth Circuit's untimeliness ruling on the merits, but those

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[1] The state trial court analyzed Banjo's second petition both as a successive petition (*see* Pet. App. 36a, citing, *e.g.*, *In re Clark*, *supra*), and as akin to a motion for new trial based on newly discovered evidence (*see id.*, citing, *e.g.*, *People v. Miller*, 37 Cal. 2d 801, 807 (1951)). Under either rubric, the same due diligence requirement applies and was deemed dispositive by the court.

arguments, too, are unpersuasive. The State appears to contend that the less-than-five-month delay between the denial of Banjo's first petition and the filing of his second petition is *per se* unreasonable, since it "greatly exceeds the time allowed by California law for the filing of a notice of appeal in a criminal proceeding, which is sixty days." Opp. 16-17. That argument ignores this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), which held that the 4½-month delay at issue there could not be deemed *per se* unreasonable under California's indeterminate "reasonable time" standard. *Id.* at 226. And, as noted in the petition, California courts have held even longer delays reasonable when supported by an adequate explanation. *See* Pet. 27 (citing cases). Here, Banjo provided a detailed explanation justifying each day of the less-than-five-month period it took to investigate the factual basis supporting his second petition and to prepare the petition itself. *See* Second Petition at 8-15, 21-22, 36-38. That showing distinguishes this case from *Evans v. Chavis*, 546 U.S. 189 (2006), which involved what the Court termed a "totally unexplained, hence unjustified, delay of at least six months." *Id.* at 201.

In short, the Ninth Circuit's ruling is erroneous, and it squarely conflicts with *Artuz* and *Villegas* by treating Banjo's alleged failure to exercise due diligence as a "condition to filing" rather than a "condition to obtaining relief." Review is therefore warranted.[2]

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[2] As noted in the petition (at pp. 15-16 n.4), reversal of the Ninth Circuit's ruling with respect to the timeliness of Banjo's second petition would render irrelevant the Ninth Circuit's alternative holding with respect to the timeliness of his California Court of Appeal petition.

2. The second question presented implicates a 2-to-1 circuit split on a significant issue involving AEDPA's tolling provision: whether a State's conditions to filing must be "firmly established" and "regularly followed" before they may be invoked to bar tolling. The State offers no meaningful response to the circuit split that exists on this issue. Opp. 25-26. It asserts that the position taken by the Eighth and Ninth Circuits is correct – that conditions to filing need not be firmly established and regularly followed – without addressing the fact that the Eleventh Circuit has come to exactly the opposite conclusion. *See Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003) (*per curiam*). The State does not deny that this issue is outcome determinative here, or that the issue is a recurring one on which national uniformity is plainly required, given its centrality to tolling analysis under AEDPA.

Contrary to the State's suggestion (Opp. 26), the Court's decision this Term in *Walker v. Martin*, 131 S. Ct. 1120 (2011), has no bearing on the outcome of this case. The Court held there that California's general timeliness rule, which bars review of claims that are "substantially delayed without justification" (131 S. Ct. at 1124), is firmly established and regularly followed, and thus could bar review of claims dismissed on the basis of a totally unexplained, five-year delay. But the Court did not decide whether California's timeliness rule could bar federal review in the context of a fully explained and justified five-month delay, as is present here. Indeed, the Court made clear that a state procedural bar "may be found inadequate when 'discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law ....'" *Id.* at 1130 (quoting 16B C.

Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4206, p. 386 (2d ed. 1996)). That principle applies in this case, for the State has not identified a single California case in which a fully explained delay of less than five months was held to be unjustified.

Walker also did not address the question presented here. The issue on which a circuit split exists is whether conditions to filing that render a state court petition improperly filed for tolling purposes must be firmly established and regularly followed before they may serve as a bar to federal court review. That issue was neither addressed nor resolved in *Walker* because no challenge was raised to the timeliness of respondent Martin's federal habeas petition. The rules governing application of AEDPA's tolling provision were therefore not at issue.

3. The last question presented addresses what is perhaps the most indefensible aspect of the decision below. Even if (contrary to *Artuz* and *Villegas*) the Ninth Circuit was correct in equating the state court's lack-of-diligence finding with untimeliness, was it permissible for the court to accept that finding as binding, without making any attempt to determine whether the finding was actually supported by the factual record in this case? Here, even under the most deferential review standard, the state court's lack-of-diligence finding could not be sustained, because Banjo's counsel provided an exhaustive explanation of the diligent efforts they made to locate additional witnesses who could corroborate Guletta's testimony (which the state court had not found credible), as well as the reasons they did not discover earlier the new exculpatory witnesses they ultimately did find. *See* Pet. 10-13. The State does not deny

that the Ninth Circuit's ruling gave conclusive, unreviewable effect to a state court finding that forever barred *any* federal review of Banjo's meritorious constitutional claims. As the petition demonstrates (at pp. 30-32), that practice is fundamentally inconsistent with this Court's precedents.

The State offers a trivial response to this weighty issue, limited to a single carryover paragraph on pages 20-21 of its brief. There the State observes that in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), this Court held that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Id.* at 414 (quoting *Saffold*, 536 U.S. at 226). That holding does not support the Ninth Circuit's abdication of its duty to review state court findings – particularly where the state court arbitrarily refused to even consider the testimony of three new independent witnesses who corroborated Guletta's testimony and thereby undermined all confidence in the correctness of the jury's verdict. The Court in *Pace* (as it had in *Saffold*) merely held that if a state court petition was in fact untimely, "that [is] the end of the matter" for tolling purposes, even if the state court ultimately denied the petition on the merits and never addressed timeliness, or found the petition untimely but proceeded to address the merits anyway. In neither *Pace* nor *Saffold* did the Court discuss the effect a federal court must give to state court findings that are relevant to tolling under AEDPA, presumably because those findings are to be reviewed, like all other state court findings, under AEDPA's deferential review standard. *See* 28 U.S.C. § 2254(d)(2), (e)(1).

In the vast majority of cases, of course, a state court's factual findings will be upheld under that standard. But in rare cases – and this is one of them – such findings cannot be sustained even under AEDPA's deferential review standard. Under the rule the State urges, and which the Ninth Circuit followed, federal courts would be obligated to accept as conclusive all state court findings respecting timeliness no matter how unreasonable they were in light of the evidence presented. For example, access to federal court could be barred altogether by a state court's clearly incorrect dismissal, on timeliness grounds (even though founded on a mathematical error), of a petition filed on the 59th day of a 60-day limitations period. Far from supporting such a regime, this Court's precedents affirmatively forbid it. *See* Pet. 31.

Earlier this Term, the Court reiterated that "[t]he writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 131 S. Ct. 770, 780 (2011). The writ cannot serve that important purpose if access to federal courts can be blocked on the basis of arbitrary, and unreviewable, state court findings. As the court in *Hughes v. Irvin*, 967 F. Supp. 775, 779 (E.D.N.Y. 1997), aptly observed: "The writ of habeas corpus would be emasculated if the factual determination of a state court could preclude a petitioner's access to federal court to challenge that very finding." That emasculation of the writ is precisely what will follow if the decision below is allowed to stand.

B. The State's Alternative Ground For Affirmance Is Meritless.

Lacking persuasive arguments to address the questions presented, the State asserts a supposed alternative ground on which the Ninth Circuit's ruling could be affirmed even if the questions presented were resolved in Banjo's favor. Opp. 11-16. The State's alternative ground for affirmance is doctrinally flawed and wholly lacking in case law support.

The State contends that, even if state law permits the filing of successive petitions in the same court, a state prisoner is never entitled to tolling under AEDPA for the interval between the filing of such petitions. According to the State, tolling under AEDPA is available only for the interval between the denial of a petition in one court and the filing of a subsequent petition in a higher court, not "for an interval between two petitions filed in the same court." Opp. 16.

That argument is meritless. As this Court recently noted, a core purpose of AEDPA's tolling provision is to permit state prisoners to exhaust all available state remedies before proceeding in federal court. *Wall v. Kholi*, 131 S. Ct. 1278, 1288 (2011). "Tolling the limitation period for all 'collateral review' motions provides both litigants and States with an opportunity to resolve objections at the state level, potentially obviating the need for a litigant to resort to federal court." *Id.* If a State authorizes the filing of successive petitions in the same court as part of affording one full round of collateral review, permitting tolling for such petitions is entirely consistent with the exhaustion and comity principles underlying AEDPA's tolling provision.

Saffold confirms this view. There, the State argued that, even if state law authorizes a prisoner to seek appellate review in a higher court, tolling should never be permitted for "the interval between a lower court's entry of judgment and the timely filing of a notice of appeal (or petition for review) in the next court." *Saffold*, 536 U.S. at 219. The Court rejected that argument because adopting such a rule would have undermined the principles of "comity, finality, and federalism" AEDPA's tolling provision is designed to serve. Absent tolling for the periods in question, AEDPA's 1-year statute of limitations would frequently expire before a prisoner could exhaust available remedies through the State's established appellate review process. That, in turn, would "encourag[e] state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review" (*id.* at 220), thereby depriving state courts of the opportunity to correct constitutional errors in the first instance. *Id.* Precisely the same evil would arise if the interval between the filing of successive petitions authorized by state law were excluded from the scope of AEDPA's tolling provision.

Lower federal courts have uniformly embraced the view that tolling is available for successive petitions filed in the same court, so long as such petitions are permitted under state law, as Banjo's second petition was here. *See, e.g.*, *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998); *see also Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999) (tolling permitted for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application"). The State does not cite a single case supporting the

contrary rule it advocates.

The State vaguely suggests that its rule is "required" by this Court's decisions in *Chavis* and *Saffold*, but that assertion is not accurate. *Chavis* and *Saffold* confirmed that tolling under AEDPA includes the interval between the denial of a petition in one court and the filing of a subsequent petition in a higher court, provided each petition is timely under state law. But the Court did not hold, as the State wrongly suggests, that tolling is available *only* if a prisoner files a subsequent petition in a higher court. That question was neither raised nor addressed in *Chavis* and *Saffold*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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